Nos. 225 and 236.
Brf. of Closson & Parsons for Appt.

Office Supreme Court U.S.
FILED
MAR 28 1901
JAMES H. MCKENNEY
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Mar. 28, 1901.

Nos. 225 and 236.

THE AMERICAN SUGAR REFINING COMPANY,
Appellant,

vs.

THE UNITED STATES,
Respondent.

BRIEF FOR APPELLANT.

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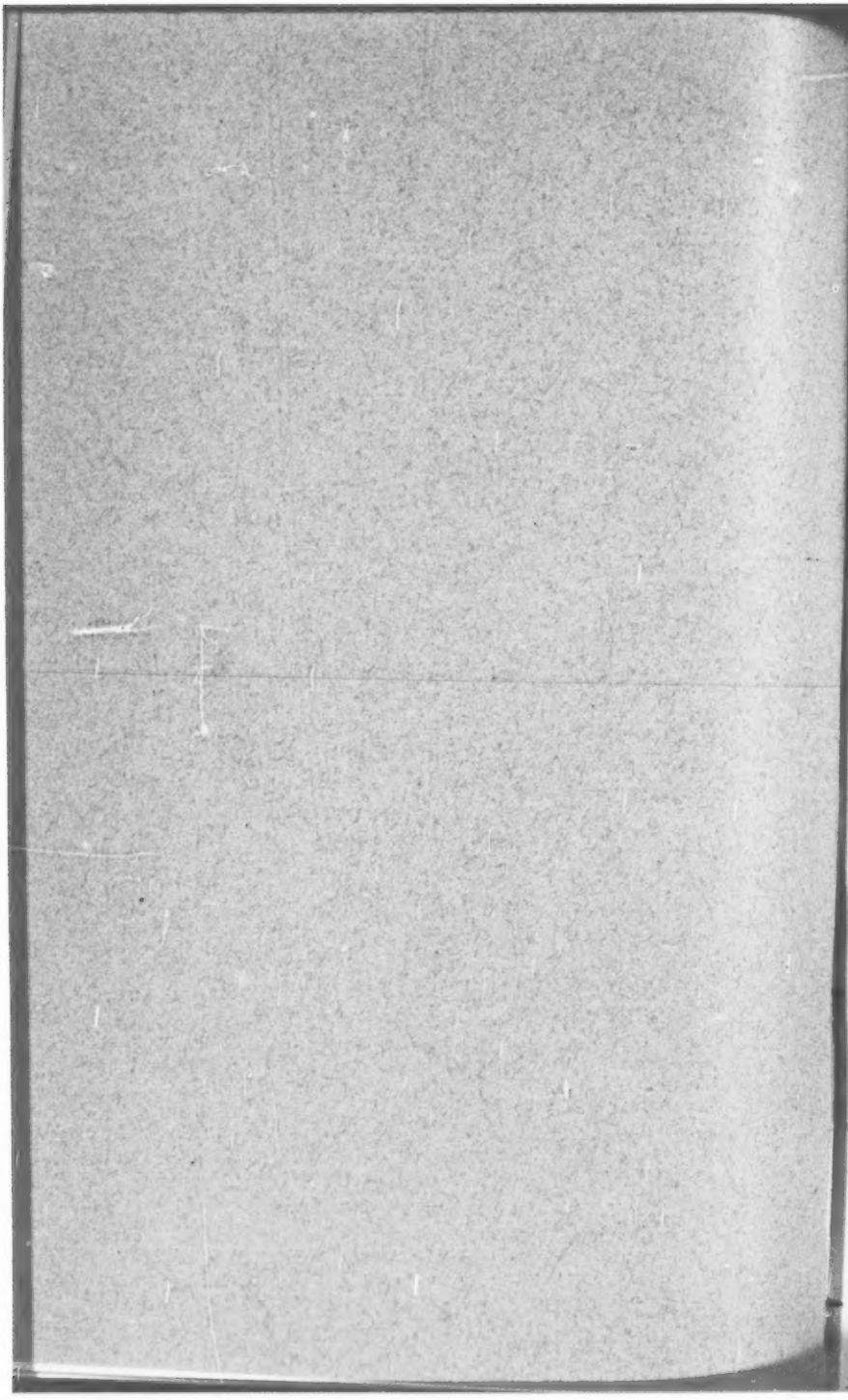

In the Supreme Court of the United States.

THE AMERICAN SUGAR REFINING COMPANY, Appellant, vs. THE UNITED STATES, Respondent.	No. 225.
SAME vs. SAME.	No. 236.

Certiorari to the Circuit Court of Appeals for the Second Circuit to review a decree of that Court affirming a decree of the Circuit Court affirming the decision of the Board of General Appraisers assessing duties upon certain cargoes of sugar imported in March, 1897, from Brazil, on the vessels "John Swan," "Richmond," "Bellaura" and "Cuvier."

Statement of the Case.

The rate and amount of duty to be paid on the sugar in question in these cases were fixed by Section 182½ of the Tariff Act of 1894, as follows:

"182½. There shall be levied, collected and paid on all sugars and on all tank bottoms, syrups of cane juice or of beet juice, melada, concentrated melada, concrete and concentrated molasses, a duty of forty per cent. *ad valorem*."

The method of determining this "value" was prescribed by statute as follows:

Customs Administrative Act of 1890. "SEC. 19. That whenever imported merchandise is subject to an *ad valorem* rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities, *at the time of exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States*, or consigned to the United States for sale, including the value of all cartons, cases, crates, boxes, sacks and coverings of any kind, and all other costs, charges and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, and if there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in the *bona fide* transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subject if separately imported. That the words 'value' or 'actual market value' whenever used in this act or in any law relating to the appraisement of imported merchandise shall be construed to mean the actual market value or wholesale price as defined in this section."

Revised Statutes, Sec. 2904 (not repealed. See Customs Ad. Act. of 1890, Sec. 29):

"When the duty upon any imports shall be subject to be levied upon the true market value of such imports in the principal markets of the country from whence the importation has been made, or at the port of exportation, the duty shall be estimated and collected upon the value *on the day of actual shipment* whenever a bill of lading shall be presented showing the date of shipment and which shall be certified by a certificate of the United States consul, commercial agent or other legally authorized deputy."

In each of these importations the Appraiser ascertained that the market value of the sugar when shipped

was a certain amount per hundred weight. To this valuation, in each case, he made an addition of a certain further amount per hundred weight to represent a supposed increase of its value during the voyage owing to drainage. Duty was accordingly assessed at forty per cent., not of the value of the sugar per hundred weight "at the time of exportation to the United "States," "on the day of actual shipment," and "in the "condition in which such merchandise is there bought "and sold for exportation to the United States," but at forty per cent. of its greater value per hundred weight in its condition when landed.

In three of these shipments these facts appear from the report of the Appraiser to the Collector.

"The value of sugar per unit of quantity advanced from 6s 8d cwt. 87° (in the case of the 'Bellaura' 7s 2d cwt. 86°), the market value when shipped, to 7s 9d cwt. 87° (in the case of the 'Bellaura,' 7s 11½d cwt. 86°), in the condition landed owing to its increased value due to drainage on the voyage of importation" (Case 225, fol. 30).

In the case of the "Cuvier" the fact of a similar addition to the market value when shipped appears from the testimony (Case 236, fol. 22).

This assessment of duties on a sum greater than the market value of the merchandise when shipped, upon its face a direct violation of the statute, it is attempted to justify by evidence of peculiar properties of the sugar, supposed to require this peculiar procedure to prevent it from escaping the duties which it ought "equitably" to bear. There is no conflict in this evidence. It is substantially as follows:

Brazil sugars of the kind in question "at the time of exportation to the United States," and "in the condition in which such merchandise is there bought and sold for exportation to the United States," usually contain from five to eight or nine per cent. of water (Case No. 236, fol. 28). Sugar containing these percentages of water will during the voyage from Brazil to the port

of New York lose in weight by drainage about double the percentage of water contained in it—*i. e.*, from ten to sixteen per cent. (Case No. 2689, fol. 81; Case No. 2676, fol. 101). As the amount of drainage is thus about double the percentage of moisture, it necessarily follows, and is proved as a fact, that this drainage consists not of water, but of molasses, sometimes so thick as to classify as sugar (Case No. 2676, fols. 104, 105; Case No. 2689, fol. 75). Drainage of this kind "is too fine an article to throw away," and there are dealers in it in this city who regularly buy it from the captains of vessels, invoice it, and pay duty on it (Case No. 236, fol. 27).

Owing to this loss in weight and the uncertainty as to its amount, it has become customary to insert in the contract of sale a guaranty that the loss shall be a certain percentage estimated by experts as the probable drainage of the particular cargo. If the loss is less than the stipulated percentage, the seller receives an additional payment in proportion; if it is greater he makes a corresponding allowance from the purchase price (Case No. 236, fols. 21–27).

Upon these facts, or rather upon such of them as appeared from the record, the importers in each case duly protested and appealed upon the ground that under the proper construction of the statute, the rate and amount of duty chargeable upon the sugar in question could be only forty per centum of its market value when shipped, and that duty upon "its increased value due to drainage on the voyage of importation" was illegally exacted.

The Board of General Appraisers overruled the protest without opinion. The importers thereupon, under Section 15 of the Customs Administrative Act, applied to the Circuit Court for a review of the questions of law and fact involved in the decision.

In the Circuit Court the further evidence was taken from which the facts already stated appeared without contradiction. Nevertheless, the learned Justice who

presided at the hearing in that Court, be it stated with the utmost respect, radically misapprehended this evidence. The errors of fact into which he fell appear from the following italicized passages of his opinion:

"Owing to drainage there are less pounds of sugar on arrival here than when the ship left Brazil, *but the cargo is actually worth as much as when it started.* It appears, therefore, that, if the sugar had been kept for the same length of time in Brazil, *the same loss in weight by drainage and increase in value per pound would have taken place there*, and *the value of the cargo as a whole would not have been affected thereby*" (Case, 225, fol. 39; Case, 236, fol. 31).

1. It is not the fact that "the cargo is actually worth as much [on arrival] as when it started." The loss during the voyage is due almost wholly, not to evaporation, which would be harmless, but to drainage (Case, 225, fol. 35; Case, 236, fol. 25). The cargo is, therefore, necessarily worth less, by exactly the amount of saccharine matter contained in the drainage. This is so great that, according to the uncontradicted evidence, this drainage, instead of being merely bilge water, is molasses, sometimes so thick as to "classify as sugar"—"too fine an article to throw away"—regularly dealt in; duly invoiced at the Custom House, and the duties upon it duly paid (Case 225, fol. 35).

2. It is not the fact that, "if the sugar had been kept "for the same length of time in Brazil, the same loss "in weight by drainage and increase of value per "pound would have taken place there."

The only express evidence on this point is that the sugars "will drain anywhere (Case 225, fol. 35) to some extent." The subject, however, calls for no evidence but the application of elementary principles of physical science. The drainage is caused by the presence of water in excess of the percentage which can be held by the sugar in its solid state. As sugar is ordinarily stored in ware-

houses, a very large proportion of this water escapes by evaporation harmlessly. Under such circumstances it is only so much of the excess of moisture as is unable to escape by evaporation, which, in filtering downwards through the sugar, dissolves some part of it before passing out as drainage. In the closely packed and confined hold of a vessel, on the contrary, the dissipation of the moisture by the harmless process of evaporation is almost wholly prevented (Case 225, fol. 35). Substantially all the water contained in the sugar must filter downwards through tier upon tier of bags to the bottom, taking toll of each specific bag through which it passes, until the saturation point is reached and it passes into the bilge as molasses, so thick often as to "classify as sugar."

3. It is not the fact that "the value of the cargo as "a whole would not have been affected thereby" (to wit, by the drainage). This is a mere corollary from the foregoing. The residue left after the drainage is undoubtedly pound for pound of higher saccharine percentage and therefore value than when shipped. But the total increase in value thus obtained necessarily falls short of compensating for the loss by drainage, by exactly the saccharine matter lost in the drainage.

These are the indisputable errors into which the Circuit Court fell in ascertaining the facts upon which its decision was to proceed. In determining the law applicable to these facts, we are bound, with great respect, to submit that it fell into errors equally indisputable. The learned Judge presiding apparently overlooked entirely the provisions of Section 19 of the Customs Administrative Act and Section 2904 of the Revised Statutes, prescribing that the duty shall be collected "upon the "value upon the day of actual shipment," "at the time "of exportation to the United States," "in the condi- "tion in which such merchandise is there bought and "sold for exportation to the United States." These sec-

tions are nowhere referred to in his opinion. Instead, he cites as the law applicable to the case only the provisions of Section 10 of the Customs Administrative Act as follows:

"That it shall be the duty of the appraisers of the United States to ascertain, estimate and appraise the actual market value and wholesale price of the merchandise at the time of exportation to the United States in the principal markets of the country whence the same has been imported" (Case, 225, fol. 38; Case, 236, fol. 31).

Under this section of the statute the learned Circuit Judge upheld what he understood to be the contention of the counsel for the Government, stated as follows:

"Counsel for the government contends that the language of section 10 refers to the value in the foreign market of said merchandise *in the condition in which it arrives at the port of New York*" (Case, 225, fol. 38; Case, 236, fol. 31).

He found, therefore, that the appraisers had not committed any "substantial error by their mode of "ascertaining the market value in Brazil of the sugar "*on its arrival here;*" and that their decision should be affirmed (Case, 225, fol. 39; Case, 236, fol. 32).

In the Circuit Court of Appeals the judgment of the Circuit Court was affirmed, but on different grounds. Although that Court also apparently overlooked the provisions of Section 2904 of the Revised Statutes, requiring that the duty should be collected "upon the value upon the day of actual shipment," it did concede that the case was governed not by Section 10 but by Section 19 of the Customs Administrative Act, and that therefore the value to be assessed must be that "at the time of exportation," "in the condition in which such mer-"chandise is bought and sold for exportation to the "United States." The Court also conceded that "it

s true that the word 'condition' (as used in Section 19) is broad enough to include any state or situation" (Case, 225, fol. 56; Case 236, fol. 49). The Court held, however, that this word "condition," "as used in "Section 19, (it) was not intended to limit the ap- "praiser to a condition which existed at the time of "the purchase *(sic,* for 'shipment'*)* but was immedi- "ately to become altered and changed until a new "condition in value was reached" (Case 225, fol. 56; Case, 236, fol. 49); and that "the construction of the "statute which would compel an ascertainment of "value as the sugar was bought in Brazil when wet, "*though justified by the language of the statute if liter-* "*ally construed,* is not sound" (Case 225, fol. 55; Case 236, fol. 48). "The loss in weight and the increase in "value are necessary incidents to the sugar of Brazil, "and it is dry sugar when it reaches New York. In "this state of facts it is incumbent upon the appraiser "*to ascertain the value of similar dry sugar in the mar-* "*kets of Brazil,* and not to be limited to its invoice "price or market value, when wet" (Case, 225, fol. 56; Case 236, fol. 49).

Upon the rendition of this judgment of the Circuit Court of Appeals, the importers in March, 1900, applied to this Court for a writ of *certiorari* to bring the cases before this Court for review. The motion was granted, in June, 1900.

Assignment of Errors.

1. Duty was assessed not only upon the actual value of the merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported, but also upon a supposed increase in the value of the merchandise over that market value upon the voyage of importation.

2. Duty was assessed upon the supposed market value of the merchandise in the condition in which it arrived at the United States and not in the condition in which the merchandise was bought and sold for exportation to the United States in the principal markets of the country whence imported.

3. Duty was assessed upon the assumption that although owing to drainage there were in each case less pounds of sugar delivered at New York than were laden on board in Brazil, the cargo was actually worth in each case as much as when it started.

4. Duty was assessed upon the assumption that the value of the cargoes as a whole was not affected by the drainage which took place during the voyage.

5. The Court below held that the legality of the appraisal depends simply upon the meaning of the following words of Section 19 of the Customs Administrative Act—to wit, " in the condition in which the " merchandise is bought for exportation."

6. The Court below held that the literal construction of the statute compels an ascertainment of the value of the sugar in the condition in which it was bought in Brazil, but that such literal construction of the statute is not sound.

7. The Court below held that the word "condition," as used in the said section of the statute, is not intended to limit the appraiser to a condition which existed at the time of the purchase, but was immediately to become altered and changed until a new condition and value was reached.

8. The Court below held that it is the duty of the appraiser to ascertain the value in the markets of Brazil of sugar in the condition in which it reached New York.

Points of Law and of Fact.

First Point. The question involved in these cases is one of the construction of the law and the facts respecting the classification of imported merchandise, and the rate of duty imposed on it under such classification. It was, therefore, properly presented under the provision of Section 14 of the act by protest and appeal to the Board of General Appraisers in the first place, and thereafter under the provisions of Section 15, by the application to the Circuit Court for a review of the questions of law and fact involved in the decision; and is now regularly before this Court for review.

In three of the cases it appears from the express statement of the Appraiser's report that he ascertained "the market value when shipped of the sugar to be a certain amount" per unit of quantity; and "advanced" this to a certain greater amount to obtain its value "in the condition landed, owing to its increased value due to drainage on the voyage of importation." In the *Cuvier* case the same thing appears from the evidence taken. The cases are, therefore, brought directly within the principle of the following decision:

U. S. vs. Passavant, 169 U. S., 16:

BY THE COURT: "Whether the dutiable value in this case was erroneously increased by the unauthorized addition of an independent item to the market value, as asserted by the importers, was a question of law and properly carried to the Board of General Appraisers by protest and appeal."

U. S. vs. Herrman, 91 Fed. Rep., 116:

BY THE COURT: "If the collector, in deciding the dutiable value of the importations in controversy, proceeded upon an appraisement by which that value was found by adding a commission to the wholesale price

or market value of the merchandise in the foreign market at the time of exportation, that decision was reviewable by the board of general appraisers under Section 14 of the Customs Administrative Act, and the decision of the board affirming the collector's decision was properly reversed by the Circuit Court because such a decision would have proceeded upon an improper construction of the law."

Second Point. The essential feature of the taxation of a civilized government is that it is absolutely fixed, uniform, calculable in advance; never imposed *ex post facto*.

In a business where the success of the manufacturer depends upon the fractions of a cent by which he can diminish the cost of his manufactured product, it is indispensable that he shall be able to reckon beforehand with proportionate exactness the various factors of this cost. Not the least important of these is the amount of duty which the Government will exact upon the imported raw material. Any construction of a tariff law which makes such a computation impossible; and permits an appraiser to depart from the plain letter of the law upon which the merchant has reckoned, for the sake of achieving what the appraiser or his superior may consider "equitable" results, or because "he does not think the importer should gain" by adapting his importations to the tariff imposed upon them, leaves the merchant to conduct not a business, but a lottery.

Merritt vs. Welsh, 104 U. S., 694, 702:

BY THE COURT: "If the quantity of saccharine matter in sugar, or its state of advancement from the raw state to a condition of refinement, is desirable as a dutiable standard, let it be so declared by the laws, and then the merchant will know on what he has to depend. Uncertainty and ambiguity are the bane of commerce. Discretion in the custom-house officer should be limited as strictly as possible. It has been

said with much truth, ' where law ends, tyranny begins.' "

Third Point. For the reason stated in the last point, it is a necessary presumption that in the Customs Administrative Act Congress has adopted a uniform and unvarying method of fixing the value of imported merchandise upon which an *ad valorem* duty is to be assessed ; and that this method is to be adhered to in every case, without regard to the greater or less amount of revenue produced by it in the particular case ; in order that the importer may in each case himself calculate in advance the amount of duty which will be exacted upon the merchandise he buys for importation.

Fourth Point. No method of fixing the value of merchandise, not only itself of fluctuating market value, but subject to change in its physical condition independently affecting its value, can meet these requirements, which does not prescribe both the time and the condition as of which the value shall be taken.

Fifth Point. There can be no doubt as to the time as of which Congress has prescribed that the value of imported merchandise shall be determined. It is " the day of actual shipment," " the time of exportation to the United States " (Revised Statutes, Sec. 2904, Customs Administrative Act, Sec. 19, *supra*).

Sixth Point. In the absence of clear evidence in the Act of a contrary intention, the requirement that the value of the merchandise shall be taken as of " the

day of actual shipment," of itself involves the requirement that the value shall be taken of it in its then actual physical condition as well.

To ascertain what would have been the value of merchandise at the time of exportation to the United States, if it had then been in a condition which in fact it only attained some weeks later, at the time of actual importation into the United States, is not, on its face, a compliance with a statute requiring simply the ascertainment of its value " at the time of exportation to the United States."

Seventh Point. Such a procedure, on the contrary, involves the interpolation by the courts into the statute of an exception which Congress itself did not see fit to put there ; for in such case the statute actually enforced would read as follows :

" Duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported ; *except that in the case of merchandise which is subject during the voyage of importation to a change in its condition affecting its value, duty shall be assessed upon what would have been the value as aforesaid of such merchandise at the time of exportation if it had then been in the condition in which it arrived in the United States.*"

1. It is familiar law that, unless constrained by clear evidence in the language of the statute itself of such an intention, the Courts do not insert into a general provision of a statute an exception which the Legislature has failed to express, however convinced they may be by considerations outside of the language of the statute that the Legislature, if its attention had been called to the point, would itself have inserted the exception.

Merritt vs. Welsh, 104 U. S., 694:

BY THE COURT: "Congress did not leave any room for doubt as to its meaning. It used apt terms to express it; terms free from all ambiguity and obscurity. If the test adopted fails to effect the desired object, the inconvenience or loss to the treasury need only be temporary: it can be changed at any moment. And it is better to submit to a temporary inconvenience than to set the laws all afloat by laying down a canon of construction which leaves the plain words, and seeks to spell out, or guess at, the supposed intent of the legislature contrary or supplementary to that which is clearly embodied in the words it has used."

Lake County vs. Rollins, 130 U. S., 662:

BY THE COURT: "If the words (of the Constitution) convey a definite meaning which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it."

Bate Refrigerating Co. vs. Sulzberger, 157 U. S., 1, 43:

BY THE COURT: "We have no authority to add to the clause last quoted (of the Statute) the words 'prior to his application.' To do so would be to legislate, and not to interpret and give effect to the Statute as passed by Congress."

Demarest vs. Wynkoop, 3 Johns., Chan. Rep., 129:

KENT, C. J., "The general words in the Statute must receive a general construction; and if there be no expressed exception the Court can create none."

Farmers' Loan and Trust Co. vs. Oregon Ry. Co., 24 Fed. Rep., 407:

BY THE COURT: "It is not likely that the members of the legislature in the passage of this act were moved by any desire to shift the burden of taxation in the case of a railway mortgage, from the shoulders of the debtor to those of the creditor, as they certainly

were in the cases of mortgages generally. But I know of no principle of law or rule of construction that authorizes a court to limit or set aside the plain language of an act upon any such surmise or conjecture, however probable. The act declares 'that all mortgages, etc., whereby land situate in more than one county in this state is made security for the payment of a debt, shall be void.' The language of the provision is plain and unambiguous. It speaks for itself and there is no room for construction. The legislature must be intended to mean what it has plainly said. In such a case the court is not at liberty to look elsewhere than the act for a possible or even probable, legislative intention. *(Cooley on Constitutional Limitations, 55).*"

2. This rule of construction is applicable to all statutes; and with especial force to those imposing taxes and duties. As to these, it is supplemented by this extension of it, that if the literal construction of the language used enables the importer to escape with the less tax than that which the looser and more liberal construction of it would impose, the importer is entitled to the literal interpretation.

U. S. vs. Isham, 17 Wall., 496.
Amer. Net and Twine Co. vs. Worthington, 141 U. S., 468.

Eighth Point. There is no where to be found in the act any evidence whatever that Congress intended to have read into it an exception authorizing merchandise subject to change in its physical condition affecting its value, to be valued in a condition different from that actually obtaining at the time prescribed for the ascertainment of its value.

Neither of the courts below, nor the counsel for the government, has undertaken to point out any language of the act indicating such an intention.

Ninth Point. On the contrary—and wholly apart from the effect to be given to the express requirement of the act that the value shall be that of the merchandise "in the condition in which such merchandise is there (in the country of exportation) bought and sold for exportation to the United States,"—there is apparent throughout the entire act the consistent purpose that the taxable value of imported merchandise shall be fixed immutably at its value "on the day of actual shipment" from the foreign port, in the condition in which it then subsists, provided only it shall so far survive the voyage as still to constitute "merchandise" when actually imported into this country.

1. It is undeniable that Congress contemplated the possibility of a change in the condition, and, consequently, in the value of merchandise during the voyage of importation; for there is an uncompromisingly clear provision for the case in which such a change during the voyage shall be in the direction of a deterioration in condition, and a consequent decrease in the value of the merchandise:

SECT. 23. "No allowance for damage to goods, wares and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon. But the importer thereof may, within ten days after the entry, abandon to the United States all or any portion of goods, wares and merchandise included in any invoice, and be relieved from the payment of the duties of the portion so abandoned, provided that the portion so abandoned amount to ten per centum or over of the total value or quantity of the invoice."

Thus, the importer of windowglass or pineapples, in good condition when paid for and shipped, pays duty on his merchandise at its value in that condition, although it be delivered to him at the end of the voyage, the glass in shattered and worthless fragments (U. S. vs. Bache, 59 Fed. Rep., 762), and the pine-

apples as decayed and equally worthless "slush" (Stone vs. Lawder, 101 Fed. Rep., 710).

These were hard cases in which to enforce the rule that the appraisable condition of merchandise is fixed unalterably at its condition "on the day of actual shipment"; and yet the consequent loss was well borne by the importers, if thereby was vindicated the principle that the standard of value fixed by law will be inflexibly and unswervingly applied in every case, however much its particular features may tempt to paltering with it. "Uncertainty and ambiguity," not high tariffs, "are the bane of commerce." But in view of this provision of the statute, and this rigid enforcement of it against the importer, it seems impossible to justify either in law or morals the refusal of the courts below to hold the Government with equal strictness to the same standard of value where, during the voyage of importation, the change in the condition of the merchandise has been in the direction of an improvement and consequent increase in value. The decision of the courts below has placed the Government in the position of exacting of the importer of merchandise which undergoes a change of condition, and therefore value during the voyage, that the dutiable value shall be ascertained before the change if for the worse; but after the change if it be for the better.

2. Another provision of the statute which requires the appraiser to value the sugar in the physical condition in which it existed "on the day of actual shipment," and not in the condition in which it arrived at the end of the voyage, is that which prescribes that the duty in question is to be "levied, collected and paid" on "sugar."

"Sugar" is a familiar commercial article of merchandise composed of from say seventy to ninety-nine per cent. of a chemically pure substance known as sucrose ($C_{12}H_{22}O_{11}$), various impurities, and one to eight per cent. of water.

If the duty were imposed not upon this compound known as sugar, but upon the pure sucrose which it contains, it would obviously be correct for the appraiser to ignore the percentage of water and other impurities contained in each pound of the compound at the time and place when and where he is by law required to value it, and to inquire simply as to the then value of the given quantity of sucrose. Inasmuch, however, as it is sugar and not sucrose which is subject to duty and required to be appraised, the inquiry of the appraiser must be as to the value of each pound of sugar at the time and place as of which he is required to value it. This value necessarily depends in part upon the relative percentages of the sucrose, impurities and water then contained in it. If he finds that at that time and place the percentage of water was large, and the value per pound correspondingly small, he must appraise it as he finds it then to have consisted, with the different percentages of sucrose, impurities and water as they then were. He has no more right to eliminate from his consideration the water it then contained simply because at a subsequent stage of its history, with which he has no proper concern, some or all of this water was, in whatever way, eliminated, than he has to disregard every then constituent of it except the sucrose and appraise that only. Such a course would be correct only if the duty were imposed upon sucrose. The method which would be correct in that case, if the duty were imposed upon sucrose, must necessarily be incorrect when the duty is imposed upon sugar—*i. e.*, both upon sucrose, impurities and water.

This rule of law the Government would find no difficulty in admitting, if it were the importer who was seeking to eliminate the water from the merchandise to be appraised and taxed. There cannot be one rule for the importer and another for the Government on the same subject. What the rule is upon this subject has already been settled by this Court.

Ernshaw vs. Cadwalader, 145 U. S., 247, 259:

"Under the provisions of the tariff act iron ore was charged with a duty of 75 cents per ton landed. The plaintiff gave evidence tending to show that a considerable percentage of the weight on which the duty had been assessed by the collector was made up of water mechanically present in the ore; that the amount of such water which iron ore contained varied according to circumstances from practically nothing up to 25 per cent.; and that practically all the moisture would dry out in the sun or would be driven out by heating the ore to the boiling point of water. The importer contended, therefore, that he could be obliged to pay duty only upon the iron ore itself, and not upon the percentage of water mechanically contained in it."

By the Court: "It appeared by the evidence that dried ore was an article unknown to commerce or trade; * * * That water mechanically mixed, is one of the natural and constant constituents of the iron ore of commerce, both domestic and foreign; and that there is no warrant for the conclusion that the iron ore of the statute is limited to dry ore, or ore with such mechanically mixed water excluded.

"Held, that it was the duty of the collector to assess the duty upon the ore in its condition at the time as of which he was required to appraise it, including whatever percentage of water it then contained."

3. Still another provision of the statute which, like the last, requires the appraiser to value the sugar in the physical condition in which it existed on the day of actual shipment, and not in the condition in which it arrived at the end of the voyage, is that which prescribes that a duty is to be imposed only upon "articles imported."

It is only so much of the sugar as actually reaches the United States and is landed there—to wit, in the cases at bar about eighty-four per cent. of the amount exported, that the appraiser can appraise.

If sixteen out of every hundred pounds of "sugar" shipped has as sugar disappeared during the voyage, being lost in the bilge and abandoned by the importer, it has thereby escaped the jurisdiction of the appraiser.

He cannot tax it as sugar, because as sugar it no longer exists. To seek to pursue each or any one of its former constituent elements, whether sucrose, water or impurities, into other merchandise and to tax it there, is simply an indirect way of doing what cannot be done directly.

Marriott vs. Brune, 9 Howard, 619 :

" Under the Act of July 30, 1846, imported sugar was taxed at 30% *ad valorem*. The sugar in question was imported in loose hogsheads from Puerto Rico and lost by drainage during the voyage about five per cent. of the invoice weight. The collector had assessed duty upon the invoice weight, refusing to make any allowance for leakage and drainage. Held error.

HEAD NOTE. " The true construction of this law is that the duty should be charged only upon that quantity of sugar and molasses which arrives in our ports, and not upon the quantity which appears upon the invoice to have been shipped."

By the Court : " The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight which arrives here. That is, what is *imported*, for nothing is imported till it comes within the limits of a port. * * * When the duty was specific on this article, being a certain rate per pound before the act of 1846, it could of course extend to no larger number of pounds than was actually entered. The change in the law has been merely in the rate and form of the duty, and not in the quantity on which it should be assessed. On looking a little further into the principles of the case, it will be seen that a deduction must be made from the quantity shipped abroad whenever it does not at all reach the United States, or we shall in truth assess here what does not exist here."

Shaw vs. Dix, 72 Fed Rep., 166 :

The Collector exacted duties on the whole number of cocoanuts specified in the invoice, deciding that Section 23 of the Act of June 10th, 1890, was applicable, and that under the ruling in U. S. vs. Bache, 59 Fed. Rep., 762, the shortage was a damage to the merchandise for which no allowance could be made, as it did

not amount in any case to ten per cent. of the total quantity of the invoice, and there could consequently be no abandonment to the United States as required by that section. The importers duly protested, claiming that they asked for no allowance for damage to the cocoanuts which actually arrived, and that they desired to pay for all cocoanuts discharged from the vessel—whether sound or damaged--but that the mass of matter, which remained after discharging the cargo, represented cocoanuts which, having rotted or been broken up on the voyage, ceased to be merchandise of any kind.

By the Court: "It is quite true that the allowance for damage to imported goods is expressly regulated by section 23 of the act of June 10, 1890; but it is true now, as it was before that act was passed, that duty is not to be assessed on an article which does not arrive in this country" (Marriott vs. Brune, 9 Howard, 619). * * *

"In U. S. vs. Bache, 59 Fed. Rep., 762, the facts presented raised a very different issue. The importation was glass in cases or packages, and a considerable breakage of glass in the cases occurred during the voyage. The cases all arrived. The contents were not destroyed but were damaged. It was clearly a case within the language of section 23."

4. If the improvement in the quality of the sugar during the voyage were due to some molecular or chemical change, not involving the supposed absorption of some of the valuable constituent elements of other adjacent cargo, it will doubtless be admitted that the consequent increase over the value at the time of exportation could not be considered by the appraiser. The fact that in the case at bar the increase is due to such absorption of valuable elements from other merchandise, is but an added reason for excluding it from consideration. The gain in value of the one is the loss in value of the other, and the two may as well belong to different owners as to one. But by the express provisions of Section 23 *(supra)* no allowance can be made for the loss in value to the one, and it must consequently be assessed as still itself contain-

ing the value in fact absorbed by the other. To likewise assess this transferred value as a part of the other, is therefore obviously to assess duty upon it twice; and this is precisely what has in fact happened in the case at bar. The Circuit Court affirmed the action of the Board of Appraisers on the express ground that "owing to drainage there are less pounds of sugar on "arrival here than when the ship left Brazil, but *the "cargo is actually worth as much as when it started;* "* * * the value of the cargo as a whole would "not have been affected thereby" (Case 225, fol. 39; Case 236, fol. 32).

Yet this very "drainage"—"too fine an article to "throw away," sometimes so thick as to classify as "sugar"—is entered at the Custom House by the captains of the vessels and duty paid on it a second time (Case 225, fol. 35).

5. It is a wholly immaterial fact that the probable loss during the voyage of a given percentage of the sugar shipped is considered by the purchaser and seller when the contract of sale is made, and is in a way provided for either by discount from the current market price or by a guarantee that the loss shall not exceed a fixed percentage or both.

U. S. vs. Southmayd, 9 Howard, 637:

This case involved the same question as *Marriott vs. Brune, supra*, with the additional fact in evidence "that the purchaser abroad takes into consideration the probable loss (by drainage during the voyage to the United States) in fixing the price to be paid."

By the Court: "It is argued that the price abroad is, therefore, lower in this proportion on this account, and, hence, that no deduction should be made here for what is taken into consideration there. But the first answer to this position is that, if the price is fixed too low there or lower than it should be on the quantity likely to be saved and to arrive here, it is the duty of the appraisers to raise the price, and it must be presumed they would raise it if required by all the facts.

[In the cases at bar the appraisers did without protest from the importers exactly this. The "6s. 8d. Avt.," which they found to be "the market value when shipped," was obtained by them precisely by "raising the price, a less amount than the "6s. 8d. Avt.," to that figure as the true "market value when shipped." It is not of this legitimate "raising of the price" to obtain the true market value, of which the importers here complain; but of the further addition to the market value thus raised, of six pence per cent., to cover the increase in value during the voyage.] In the next place, this calculation by the merchant abroad in fixing the price is a mere speculative or commercial one, connected with the profit and loss, and not with a view to the duties to be assessed here. Again, the duty here is regulated by law, and not by any estimates of such a character by men of business, and by law it is imposed on the quantity entered here, and not the quantity shipped abroad, and on the true price abroad as estimated by the appraisers, and not necessarily as estimated by the owners. Again, if the owner was benefited by this drainage in the improved quality of the sugars or molasses left, and to the extent of the loss in weight, there might be some equity in considering him liable for the weight abroad. But, as explained in the preceding case, such does not seem to be the current of the evidence. There are cases likewise of imports here made by the producers of the article abroad. In those this supposed element in the price to prevent the justice of a reduction in the weight here could hardly exist, as there is no sale abroad, and this shows the incongruity and want of applicability of such a fact to constitute a rule in any case for estimating *ad valorem* duties."

Tenth Point. The Circuit Court of Appeals considered that the question of the legality of the appraisal in the case at bar "depends upon the meaning of the words 'in the condition in which the merchandise is bought for exportation'" (Case, 225, fol. 55; Case, 236, fol. 48). On the contrary, the case has been so far argued as if there were no such words in the statute. The words "in the condition in which such

" merchandise is there bought and sold for exporta-
" tion to the United States " are, however, in the statute. They of themselves remove any possible doubt as to whether Congress, in requiring imported merchandise to be valued on a certain day, intended it to be valued in its then condition, or in a condition which it never attained until the end of the voyage of exportation.

The Circuit Court of Appeals escaped this conclusion only by holding that the word " condition," " although broad enough to include any state or situa-
" tion," and although this interpretation of it is " jus-
" tified by the language of the statute if literally con-
" strued," is here used to mean simply " the state or
" condition of the preparedness of the merchandise for
" shipment when sold."

It is really immaterial whether this construction could, apart from the context, be justified or not, because the other provisions of the statute of themselves require the appraiser to value the merchandise in the condition obtaining at the time at which he is required to ascertain its value.

The construction is, however, *per se* indefensible :

1. It confessedly ignores the "literal" meaning of the act, in order to impose a heavier tax upon the importer than he would otherwise have to bear. This is never permitted.

U. S. vs. Isham, supra.
Amer. Net & Twine Co., supra.

2. It requires the Court, in violation of principles already considered, to interpolate into the act an exception to the general language employed by Congress, as follows :

" The duty shall be assessed upon the actual market value * * * in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States

for sale, *excepting such physical conditions as will alter during the voyage to the United States; and, as to such, in the condition in which the merchandise reaches the United States.*"

3. The construction is in effect, that the only features of the merchandise included by the word "condition," as used in the statute, are the artificial preparations for shipment which it has undergone, "whether packed "or unpacked, specially prepared for a voyage or un- "prepared, and the expense incident to placing the "merchandise into condition for shipment."

Such a construction of the act does violence to the language of the act itself. The language of it is that the merchandise shall be valued "in the condition in "which such merchandise is there bought and sold for "exportation to the United States, or consigned to the "United States for sale, *including* the value of all "cartons, cases, crates, boxes, sacks and coverings of "any kind, and all other costs, charges and expenses "incident to placing the merchandise in condition "packed ready for shipment to the United States."

"Including" is not synonymous with "*videlicet.*" If the "condition" in which the merchandise is to be valued "includes" these things, as the statute says, it is because it is not merely the equivalent of them, but includes other things as well; to wit, that physical state or condition of the merchandise, which, admittedly, "it is broad enough to include."

(4) For the distinction attempted to be drawn by the Circuit Court of Appeals—to wit, between a condition of sufficient permanency to outlast the voyage and a condition subject to change during the voyage—there is confessedly no warrant or suggestion in the language of the act itself. On the contrary, the clear language of Section 23, excluding from the consideration of the appraiser any change in the physical condition of the merchandise when for the worse, expressly forbids it. A cargo of oranges or bananas, no

less than one of Brazil sugars, is when shipped in a condition "immediately to become altered and "changed until a new condition and value is "reached." This change in condition and value is a "necessary incident" to green fruit no less than to green sugars. Whether it tends to increase or diminish the value of the fruit depends simply upon the extent of the change at the termination of the voyage. That in turn may depend upon whether the shipment is by steam or sailing vessel. According to the Circuit Court of Appeals, if the fruit is overripe when it reaches New York, the appraiser must inquire the value at the port of shipment, not of a cargo of the fruit in the condition in which it was in fact shipped, but of a cargo of overripe fruit, and assess the duty upon the result, thus flatly violating the prohibitions of Section 23.

Eleventh Point. In the Circuit Court the case was decided in favor of the Government because the learned Circuit Judge did not "think the importer should [*i. e.*, ought to] gain" by buying sugars which increase rather than decrease in value during the voyage, and so escaping the duty which he would have had to pay if their value had been as great when shipped as when landed. The Court of Appeals, however, admitted that the question is solely of "the "legality of the appraisal, not of its accuracy or "equity." And in this court it certainly is still less necessary for the importer to argue, that to the conditions presented by the sugar tariff adopted by Congress he had the right and was indeed invited to adjust his business; or that, if under the Tariff Act of 1894, he found it to be to his advantage thereafter to import a larger percentage of green or wet sugars and a smaller percentage of dry or cured sugars than theretofore, the opportunity to lessen thereby the cost to himself of his raw material was a wholly legitimate

one by which he not only "should gain," but must gain, at the peril of being crowded out of business by less Quixotic competitors.

Seeberger vs. Farwell, 139 U. S., 610.
Merritt vs. Welsh, 104 U. S., 694.

Doubtless no fixed standard can be adopted to which the importer will not be able in some cases, at any rate, to adapt his business more successfully than was anticipated by Congress, or is pleasing to the customs officials, or to the courts. Nevertheless there is every reason to suppose that Congress was right in anticipating that the standard adopted—to wit, the value of the merchandise when shipped from the country of exportation, in the condition when shipped—would, in the vast majority of cases, work to the advantage of the Government. A long sea voyage is not commonly regarded as likely to enhance the value of articles of trade. Green sugars and madeiras are, perhaps, the only exceptions. It was with the wisdom of experience that Congress determined in taxing imported merchandise to take its value before rather than after it had been subjected to the perils of a sea voyage. It is, on the whole, for the interest of the Government itself that the standard which Congress has intelligently adopted shall be uniformly and rigorously adhered to in every case.

Last Point. The judgment should be reversed, and the case remanded with instructions to reverse the judgment of the Circuit Court, and to direct an assessment of the duty only upon the market value of the sugar when shipped, in the condition in which it was shipped.

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